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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92052307
Party	Defendant Richard E. Swan
Correspondence Address	Richard E. Swan 171 West Street East Bridgewater, MA 02379 UNITED STATES
Submission	Other Motions/Papers
Filer's Name	Cheryl A. Clarkin
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Date	05/04/2010
Attachments	USPTO Motion for Suspension of Proceeding.pdf ( 71 pages )(1690715 bytes )

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Austin Precision Products Inc.  
d/b/a LaRue Tactical,

Petitioner,

v.

Richard E. Swan,

Registrant.

Cancellation No. 92052307

Registration No. 3385512

**MOTION FOR SUSPENSION OF PROCEEDINGS**

Pursuant to 37 CFR § 2.117 and Trademark Trial and Appeal Board Manual of Procedure (TBMP) Chapter 510.02(a), Registrant respectfully requests that the above-captioned cancellation proceeding be suspended pending a final determination in a civil litigation pending in the United States District Court for the District of Massachusetts, Civil Action No. 1:09-CV-10034 filed January 12, 2009. Registrant has sued petitioner for infringement of Trademark Registration No. 3385512. Petitioner has counterclaimed in that suit for invalidity of Registration No. 3385512 because the mark fails to function as a mark, is not inherently distinctive and has not achieved secondary meaning. Attached hereto are copies of the original complaint and answer and counterclaims, as well as the second amended complaint and second amended answer and counterclaims as filed. The determination of whether a mark fails to function as a mark, inherent distinctiveness, and acquired distinctiveness is central to the Petitioner's defense in the civil litigation, as well as in this cancellation. Respondent therefore submits that the pending civil litigation will have a direct bearing on this cancellation proceeding. See 37 CFR § 2.116(a); General Motors Corp. v. Cadillac Club Fashions Inc., 22 USPQ2d 1933 (TTAB 1992).

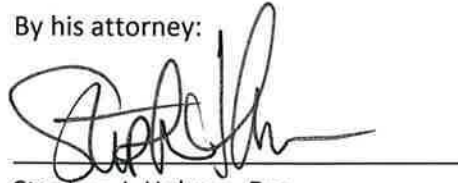
Moreover, the civil litigation has been pending for over one (1) year, and is now in an advanced stage of discovery. Attached hereto is a copy of a recent scheduling order setting forth that discovery must be completed by June 18, 2010 and that dispositive motions must be filed by October 25, 2010. Discovery in the present cancellation, if permitted to continue, will not close until November 6, 2010, after dispositive motions in the Civil Action. Respondent believes that allowing continued discovery in the present cancellation will undermine and disrupt the already completed process in the pending Civil Action.

Given that the cancellation proceeding has just been filed and there are no other pending issues before this Board by either party, Respondent respectfully requests favorable action on this motion.

Respectfully Submitted,

RICHARD E. SWAN

By his attorney:

A handwritten signature in black ink, appearing to read 'SJH', is written over a horizontal line.

Stephen J. Holmes, Esq.

Barlow, Josephs & Holmes

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **MOTION FOR SUSPENSION OF PROCEEDINGS** was served on counsel for Petitioner, this 4th day of May, 2010 by sending same via First-Class Mail, postage prepaid to:

Gail Taylor Russell  
Attorney for Petitioner  
Taylor Russell & Russel, P.C.  
10601 FM 2222  
Building R, Suite 12  
Austin, TX 78730

A handwritten signature in black ink, appearing to read 'Stephen J. Holmes', is written over a horizontal line.

Stephen J. Holmes

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

ATLANTIC RESEARCH MARKETING  
SYSTEMS, INC.,

Plaintiff,

vs.

AUSTIN PRECISION PRODUCTS, INC. d/b/a  
LARUE TACTICAL

Defendant.

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C.A. No. 09-\_\_\_\_\_

**COMPLAINT**

Plaintiff, Atlantic Research Marketing Systems, Inc. (“A.R.M.S.”), brings this action against defendant, Austin Precision Products, Inc. d/b/a LaRue Tactical (“LaRue Tactical”) for patent infringement, trade dress infringement, trademark infringement and common law unfair competition. By this Complaint, A.R.M.S. seeks, *inter alia*, injunctive relief and monetary damages and alleges as follows:

**PARTIES**

1. A.R.M.S. is a Massachusetts corporation with its principal place of business located at 230 W. Center Street, West Bridgewater, Massachusetts. A.R.M.S. manufactures, markets and sells innovative small arms accessories designed and developed by its founder, president and Chief Executive Officer, Richard Swan. A.R.M.S.’ products are sold domestically and internationally for military, government and civilian use through several channels, such as retailers, distributors, Internet sales and mail order catalogs.

2. Upon information and belief, LaRue Tactical is a Texas corporation with its principal place of business located at 850 County Road 177, Leander, Texas. Upon information and belief, LaRue Tactical manufactures, markets and sells small arms accessories. Upon

information and belief, LaRue Tactical has sold and continues to sell its products in Massachusetts and throughout the United States through several channels, such as retailers, distributors, mail order catalogs and over the Internet.

### **JURISDICTION AND VENUE**

3. This Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1338(a) and (b). This Court has supplemental jurisdiction over the state law and common law causes of action pursuant to 28 U.S.C. § 1367.

4. This Court has personal jurisdiction over LaRue Tactical because, upon information and belief, LaRue Tactical does business in Massachusetts and markets and sells infringing products in Massachusetts.

5. Venue is proper under 28 U.S.C. § 1391(b) and (c) and 28 U.S.C. § 1400(b).

### **FACTS**

#### **A.R.M.S., Its Products and Intellectual Property**

6. For over twenty-eight years, A.R.M.S. and Richard E. Swan have designed, manufactured, marketed and/or sold small arms accessories, and other mount interface devices for commercial and military uses. Mr. Swan has invented and patented numerous devices for small arms products, and crew-served weaponry, such as iron sights, mounts, rail platforms, sleeved rails, dovetail rails, anti-armor mounts and grenade launcher mounts.

7. Among other things, A.R.M.S. develops and manufactures distinctive, high-quality weapon mounts for use in attaching to weapon platforms: flashlights, pistol grips, bipods, slings, optical lens sights, holographic lens sights, laser sights, and night vision devices in the nature of infrared detectors, invisible light projectors, thermal imaging, sensors, cameras and scopes.

8. For over twenty years, A.R.M.S. exclusively has used an actuator platform extending from the side of many of its weapon mount configurations (the “Lever Mount System”). Consumers of weapon mounts associate the Lever Mount System with A.R.M.S.

9. To protect the substantial goodwill associated with the design of its weapon mounts, Mr. Swan applied for and received a trademark registration from the United States Patent and Trademark Office (“PTO”) for its distinctive Lever Mount System (the “Lever Mount Trade Dress”). (A true copy of U.S. Trademark Reg. No. 3,466,163, granted July 15, 2008, reflecting a first-use in commerce on June 1, 1998, is attached hereto as Exhibit A.) Mr. Swan granted A.R.M.S. an exclusive license to make, use, market and sell the Lever Mount Trade Dress.

10. A.R.M.S. also manufactures, markets and sells a specific type of dovetail weapon mount, branded with the trademark, #17<sup>®</sup>, that features a rectangular base portion having a substantially semi-circular actuator platform extending from one side thereof.

11. A.R.M.S. distinguishes its #17<sup>®</sup> brand in the marketplace by offering a dovetail weapon mount with superior design, performance, functionality and durability.

12. A.R.M.S. first used the trademark, #17<sup>®</sup>, in commerce on June 1, 1998 in connection with this particular type of weapon mounts and has been using it in commerce continuously since then.

13. During its long, widespread and continuous use of the #17<sup>®</sup> brand, A.R.M.S. has expended considerable sums of money to advertise and promote the #17<sup>®</sup> brand. The #17<sup>®</sup> brand has been prominently featured throughout the United States and the world in brochures, industry publications and on its web site.

14. Through its promotion, advertising and quality of products, A.R.M.S. has developed considerable goodwill in its #17<sup>®</sup> brand, which is widely associated by consumers as weapon mounts manufactured and sold by A.R.M.S.

15. To protect the substantial goodwill associated with its products, Mr. Swan applied for and received a trademark registration from the PTO for its #17<sup>®</sup> trademark. (A true copy of U.S. Trademark Reg. No. 3,385,512, granted February 19, 2008, reflecting first-use in commerce on June 1, 1998, is attached as Exhibit B.) Mr. Swan granted A.R.M.S. an exclusive license to exploit the #17<sup>®</sup> trademark.

16. The #17<sup>®</sup> brand is recognized and relied on as identifying A.R.M.S. as the sole source of goods designated with the #17<sup>®</sup> mark and has become widely known amongst consumers and weapon mount industry as identifying high quality dovetail weapon mounts originating from Plaintiff. Accordingly, the #17<sup>®</sup> mark is a valuable commercial asset.

17. Additionally, to protect the substantial goodwill associated with the design of the A.R.M.S. #17<sup>®</sup> weapon mount product, Mr. Swan applied for and received a trademark registration from the PTO for its distinctive mounting platform (the “#17<sup>®</sup> Mounting Platform Trade Dress”). (A true copy of U.S. Trademark Registration Reg. No. 3,478,909, granted August 5, 2008, reflecting first-use in commerce on June 1, 1998, is attached as Exhibit C.) Mr. Swan granted A.R.M.S. an exclusive license to make, use, market and sell the #17<sup>®</sup> Mounting Platform Trade Dress registration to A.R.M.S. (The Lever Mount Trade Dress and the #17<sup>®</sup> Mounting Platform Trade Dress collectively shall be referred to as the “Trade Dress.”)

18. The Trade Dress is unique in the weapon mount marketplace, examples of which are illustrated in Exhibits D and E attached hereto.



19. The Trade Dress creates a unique commercial impression and sets A.R.M.S.’ weapon mounts apart from those offered by other manufacturers. Consumers of weapon mounts associate the Trade Dress as originating from A.R.M.S.

20. In an effort to promote among weapon mount consumers a conscious connection between the Trade Dress and A.R.M.S., A.R.M.S. has expended considerable sums to advertise and promote the Trade Dress and its associated products. The Trade Dress has been prominently featured throughout the United States in press releases, industry publications and trade shows, and on its website.

21. Certain of A.R.M.S.’ dovetail weapon mounts also incorporate a specific type of lever system known as a Throw Lever<sup>®</sup>. On July 11, 1989, the PTO issued to Mr. Swan U.S. Patent No. 4,845,871 (the “‘871 patent”). (A true copy of the ‘871 patent is attached hereto as Exhibit F.) Mr. Swan granted A.R.M.S. an exclusive right to exploit the ‘871 patent. The ‘871 patent expired on April 19, 2008.

22. A.R.M.S. has had great success selling its weapon mounts incorporating the patented Throw Lever<sup>®</sup>.

23. A.R.M.S.’ patented weapon mounts are a valuable asset of A.R.M.S. and a principal source of the company’s goodwill.

#### **LaRue Tactical’s Products and Infringement of the Trade Dress**

24. LaRue Tactical manufactures, markets, sells and/or offers to sell, among other things, weapon mounts through retailers, distributors, mail order catalogs and over the Internet.

25. LaRue Tactical is engaging in the unauthorized use of the Trade Dress in connection with the sale of weapon mounts. Select examples of LaRue Tactical’s infringing use

of the Trade Dress are attached as Exhibit G.

26. LaRue Tactical's infringing use of the Trade Dress in connection with the manufacture and distribution of weapon mounts is calculated to deceive consumers into believing that LaRue Tactical's products are provided by, originated from or are associated with A.R.M.S.

27. LaRue Tactical's use of the Trade Dress in connection with weapon mounts is likely to cause confusion with consumers and customers within the small arms industry.

28. Upon information and belief, LaRue Tactical intentionally copied the Trade Dress.

29. Upon information and belief, LaRue Tactical is attempting to confuse and mislead weapon mount consumers by offering for sale, advertising and selling its weapon mounts through retailers, trade shows, catalogs and on the Internet.

30. Upon information and belief, LaRue Tactical misappropriated the Trade Dress for the express purpose of trading on A.R.M.S.' well-known and distinctive Trade Dress.

**Infringement of the #17<sup>®</sup> Trademark**

31. LaRue Tactical is manufacturing, marketing, selling and/or offering to sell weapon mounts bearing the #17<sup>®</sup> mark.

32. LaRue Tactical's use of the #17<sup>®</sup> mark in connection with weapon mounts implies, falsely, that it manufactures and sells #17<sup>®</sup> weapon mounts. (A true copy of a website printout featuring the "LaRue Tactical Surefire 17 Upgrade LT-170" is attached hereto as Exhibit H.)

33. LaRue Tactical's use of the #17<sup>®</sup> brand in connection with weapon mounts is calculated to deceive consumers into believing that LaRue Tactical's weapon mounts are

provided by or associated with A.R.M.S.

34. LaRue Tactical's use of the #17<sup>®</sup> brand in connection with weapon mounts is likely to cause confusion with consumers and customers within the small arms industry.

35. Further, upon information and belief, LaRue Tactical is using the #17<sup>®</sup> mark in connection with weapon mounts for the express purpose of trading on A.R.M.S.' well-known and respected #17<sup>®</sup> brand.

**Infringement of the '871 Patent**

36. LaRue Tactical is manufacturing, marketing, selling and/or offering to sell weapon mounts incorporating a so-called "speed lever" (the "Accused Products").

37. The Accused Products infringe one or more of the claims of the '871 patent.

38. A.R.M.S. wrote to LaRue Tactical demanding that it immediately cease and desist its sale of the Accused Products. Notwithstanding this, LaRue Tactical continued to market and sell the Accused Products.

39. LaRue Tactical intentionally infringed the '871 patent by manufacturing, marketing, selling and/or offering for sale the Accused Products in the United States, including Massachusetts.

40. LaRue Tactical's wrongful actions were conducted without authorization or license.

41. LaRue Tactical had prior knowledge of the '871 patent, and therefore its conduct is both willful and deliberate.

**COUNT I**  
**(Infringement of the '871 Patent—35 U.S.C. §271)**

42. A.R.M.S. realleges and incorporates by reference paragraphs 1 through 41 as if fully set forth herein.

43. Defendant knowingly and intentionally infringed the '871 patent.

44. A.R.M.S. has suffered substantial damage as a result of Defendant's infringement of the '871 patent including, but not limited to, the loss of commercial value of its Throw Lever<sup>®</sup> product line, loss of the value of its patent, loss of goodwill, and other injuries to A.R.M.S.' business.

45. A.R.M.S. is entitled to an accounting of defendant's profits derived from the sale of the Accused Products.

46. Defendant committed such acts in an intentional and willful manner that make this case exceptional under 35 U.S.C. § 285.

**COUNT II**  
**(Federal Trade Dress Infringement—15 U.S.C. §1125(a))**

47. A.R.M.S. realleges and incorporates by reference paragraphs 1 through 46 as if fully set forth herein.

48. Defendant, without the consent of A.R.M.S., has used, and is using, in commerce A.R.M.S.' Trade Dress in connection with the sale and offering for sale of weapon mounts, which use is likely to cause confusion, or to cause mistake or to deceive.

49. Upon information and belief, Defendant had actual knowledge of A.R.M.S.' ownership and prior use of the Trade Dress and, without consent of A.R.M.S., has used, and is using, the Trade Dress with the intent to trade upon A.R.M.S.' reputation and goodwill by causing confusion and mistake among customers and the public, and by deceiving them.

50. Defendant's acts constitute trade dress infringement in violation of Section 43(a) of the Lanham Act, 15 U.S.C. §1125(a).

51. Defendant's acts are intentional, willful and in bad faith.

52. The aforesaid acts of Defendant have caused, and are causing irreparable harm and damage to A.R.M.S., and unless preliminary and permanently restrained by this Court, said irreparable injury will continue.

53. A.R.M.S. has no adequate remedy at law.

**COUNT III**  
**(Federal Unfair Competition, False Designation of Origin and**  
**False Advertising—15 U.S.C. §1125(a))**

54. A.R.M.S. realleges and incorporates by reference paragraphs 1 through 53 as if fully set forth herein.

55. The aforesaid acts of Defendant constitute the intentional use of words, terms, names, symbols and devices and combinations thereof, false designations of origin, and false and misleading representations of fact that are likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection or association of Defendant with A.R.M.S., or as to the origin, sponsorship or approval of Defendant's products.

56. The aforesaid acts of Defendant constitute the use of words, terms, names, symbols and devices and combinations thereof, false designations of origin, and false and misleading representations of fact that in commercial advertising or promotion, misrepresent the nature, characteristics or qualities of Defendant's products or other commercial activities.

57. The aforesaid acts of Defendant constitute false designation of origin, false and misleading descriptions and representations, federal unfair competition and false advertising in violation of Section 43(a) of the Lanham Act, 15 U.S.C. §1125(a).

58. The aforesaid acts of Defendant have caused, and are causing, great and irreparable harm and damage to A.R.M.S., and unless preliminarily and permanently restrained

by this Court, said irreparable injury will continue.

59. A.R.M.S. has no adequate remedy at law.

**COUNT IV**  
**(Federal Trademark Infringement—15 U.S.C. §1114)**

60. A.R.M.S. realleges and incorporates by reference paragraphs 1 through 59 as if fully set forth herein.

61. Defendant, without the consent of A.R.M.S., has used in commerce marks confusingly similar and/or identical to A.R.M.S.' federally-registered #17<sup>®</sup> trademark in connection with the sale and offering for sale of weapon mounts, which use is likely to cause confusion, or to cause mistake or to deceive.

62. Defendant's acts constitute trademark infringement in violation of Section 32(1) of the Lanham Act, 15 U.S.C. § 1114.

63. Defendant's acts are intentional, willful and in bad faith.

64. The aforesaid acts of Defendant have caused, and are causing, great and irreparable harm and damage to A.R.M.S., and unless preliminarily and permanently restrained by this Court, said irreparable injury will continue.

65. A.R.M.S. has no adequate remedy at law.

**COUNT V**  
**(Common Law Unfair Competition)**

66. A.R.M.S. realleges and incorporates by reference paragraphs 1 through 65 as if fully set forth herein.

67. Defendant's aforesaid acts are a violation and derogation of A.R.M.S.' common law rights and are likely to cause confusion, mistake and deception among consumers and the public as to the source, origin, sponsorship, or quality of Defendant's products, and Defendant's

aforesaid acts are likely to cause confusion, mistake and deception among consumers and the public as to Defendant's affiliation with or sponsorship by A.R.M.S. of Defendant's aforesaid acts.

68. Defendant's aforesaid acts are causing loss, damage and injury to A.R.M.S. and to the purchasing public.

69. Defendant knows, or in the exercise of reasonable care should know, that its conduct is likely to so mislead the public.

70. The foregoing conduct by Defendant has been knowing, deliberate, willful, intended to cause mistake or to deceive, and in disregard of A.R.M.S.' rights.

71. Defendant's wrongful acts, as alleged above, have permitted or will permit it to make substantial sales and profits on the strength of A.R.M.S.' nationwide and international marketing, advertising, sales and consumer recognition.

72. As a direct and proximate result of Defendant's wrongful conduct, as alleged above, A.R.M.S. has been and will be deprived of substantial sales of products and services in an amount as yet unknown but to be proved at trial, and has been and will be deprived of the value of its registered trade dress, trademarks and brand in an amount as yet unknown, but to be determined at trial.

73. The aforesaid acts of Defendant constitute unfair competition in violation of common law.

74. The aforesaid acts of Defendant have caused and are causing irreparable harm and damage to A.R.M.S., and unless preliminarily and permanently restrained by this Court, said irreparable injury will continue.

75. A.R.M.S. has no adequate remedy at law.

### **RELIEF REQUESTED**

WHEREFORE, Plaintiff, Atlantic Research Marketing Systems, Inc. prays for judgment in its favor and against Defendant Austin Precision Products, Inc. d/b/a LaRue Tactical, and requests that:

A. Judgment enter in its favor and against Defendant on each Count of the Complaint;

B. Defendant be adjudged to have infringed the '871 patent and that such infringement be adjudged to have been willful;

C. A.R.M.S. be awarded compensatory damages in an amount no less than a reasonable royalty of Defendant's gross sales of the Accused Products during the patent term;

D. A.R.M.S. be awarded treble damages pursuant to 35 U.S.C. § 284 because of the willful nature of Defendant's acts;

E. A.R.M.S. be awarded prejudgment interest;

F. A.R.M.S. be awarded its costs, attorneys' fees, and expenses in this suit under 35 U.S.C. § 285;

G. Defendant, and each of its officers, directors, agents, servants, employees and representatives, and those persons in active concert or participation with them or any of them, be preliminarily and permanently enjoined and restrained from:

(1) using on or in connection with the advertising, promotion, offering for sale, sales or distribution of small arms products, the #17<sup>®</sup> Mark or any variations thereof that are confusingly similar to Plaintiff's #17<sup>®</sup> Mark;

(2) using on or in connection with the advertising, promotion, offering for sale,



sales or distribution of small arms products, the Trade Dress or any variations thereof or anything confusingly similar thereto;

(3) representing by any means whatsoever, directly or indirectly, or doing any other act (or things calculated or likely to cause confusion, mistake or to deceive consumers into believing that Defendant's products are those of A.R.M.S., or that there is any affiliation or connection between A.R.M.S. or its products and Defendant or its products, and from otherwise unfairly competing with Plaintiff);

(4) causing to be advertised, published or disseminated by any means any false or misleading representations as to the existence of any relationship between Defendant and A.R.M.S. or between any products of Defendant and any products and services of A.R.M.S.;

H. A.R.M.S. recover its damages sustained as a result of Defendant's infringement, unfair competition and false designation of origin under federal, state and common law, together with an accounting of Defendant's profits arising from such activities, and that the Court exercise its discretion and enter a judgment for such additional sums as the Court shall find to be just, according to the egregious, willful and intentional nature of the acts of Defendant;

I. Defendant be required to: (1) surrender for destruction, or other disposition at the election of A.R.M.S., all extrusions, molds, dies, components-in-progress, components, production materials, products, castings, fixtures, prints, computer programs, solid modeling, prototypes, engineering records and all means of manufacture associated with the production of products that infringe A.R.M.S.' Trade Dress; and (2) recall from any and all channels of trade, any and all advertising or promotional materials using the #17<sup>®</sup> mark and/or the Trade Dress in connection with small arms products or any variations thereof that are confusingly similar to Plaintiffs mark and/or Trade Dress, and to take affirmative steps to dispel any false suggestion of

a connection to A.R.M.S. by virtue of its activities, including, but not limited to, all necessary and appropriate corrective advertising measures;

- J. A.R.M.S. recovers treble damages under 15 U.S.C. § 1117;
- K. A.R.M.S. recovers its reasonable attorneys' fees pursuant to 15 U.S.C. § 1117;
- L. A.R.M.S. recovers its costs and disbursements herein; and
- M. A.R.M.S. be awarded such other and further relief as this Court may deem just

and proper.

**PLAINTIFF HEREBY DEMANDS A TRIAL BY JURY  
FOR ALL ISSUES SO TRIABLE.**

Respectfully submitted,  
ATLANTIC RESEARCH  
MARKETING SYSTEMS, INC.  
By its Attorneys

/s/ Craig M. Scott

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Craig M. Scott (BBO No. 556210)  
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Dated: January 9, 2009

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

ATLANTIC RESEARCH MARKETING  
SYSTEMS, INC.,

*Plaintiff,*

v.

AUSTIN PRECISION PRODUCTS, INC.  
d/b/a LARUE TACTICAL,

*Defendant,*

C.A. No. 09-CV-10034-LTS

**DEFENDANT'S ANSWER**

Defendant Austin Precision Products, Inc. d/b/a LaRue Tactical ("LaRue Tactical") file their answer to the Original Complaint of Plaintiff, Atlantic Research Marketing Systems, Inc., ("A.R.M.S.") and respectfully shows the Court as follows:

**PARTIES**

1. LaRue Tactical lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph one and therefore denies them.
2. LaRue Tactical admits the allegations in paragraph two.

**JURISDICTION AND VENUE**

3. LaRue Tactical admits the allegations in paragraph three.
4. LaRue Tactical denies the allegations in paragraph four to the extent it alleges that Larue Tactical markets and sells "infringing" products in Massachusetts. Subject to such denial of the term "infringing," LaRue Tactical admits the allegations in paragraph four.

5. LaRue Tactical admits the allegations in paragraph five.

**FACTS**

6. LaRue Tactical lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph six and therefore denies them.

7. LaRue Tactical lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph seven and therefore denies them.

8. LaRue Tactical lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph eight and therefore denies them.

9. LaRue Tactical lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph nine and therefore denies them.

10. LaRue Tactical lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph ten and therefore denies them.

11. LaRue Tactical lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph eleven and therefore denies them.

12. LaRue Tactical lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph twelve and therefore denies them.

13. LaRue Tactical lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph thirteen and therefore denies them.

14. LaRue Tactical lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph fourteen and therefore denies them.

15. LaRue Tactical lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph fifteen and therefore denies them.

16. LaRue Tactical lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph sixteen and therefore denies them.

17. LaRue Tactical lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph seventeen and therefore denies them.

18. LaRue Tactical lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph eighteen and therefore denies them.

19. LaRue Tactical lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph nineteen and therefore denies them.

20. LaRue Tactical lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph twenty and therefore denies them.

21. LaRue Tactical lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph twenty-one and therefore denies them.

22. LaRue Tactical lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph twenty-two and therefore denies them.

23. LaRue Tactical lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph twenty-three and therefore denies them.

24. LaRue Tactical admits the allegations contained in paragraph twenty-four.

25. LaRue Tactical denies the allegations contained in paragraph twenty-five.

26. LaRue Tactical denies the allegations contained in paragraph twenty-six.

27. LaRue Tactical denies the allegations contained in paragraph twenty-seven.

28. LaRue Tactical denies the allegations contained in paragraph twenty-eight.

29. LaRue Tactical denies the allegations contained in paragraph twenty-nine.

30. LaRue Tactical denies the allegations contained in paragraph thirty.

31. LaRue Tactical denies the allegations contained in paragraph thirty-one.

32. LaRue Tactical denies the allegations contained in paragraph thirty-two.

33. LaRue Tactical denies the allegations contained in paragraph thirty-three.

34. LaRue Tactical denies the allegations contained in paragraph thirty-four.

35. LaRue Tactical denies the allegations contained in paragraph thirty-five.

36. LaRue Tactical admits the allegations contained in paragraph thirty-six.

37. LaRue Tactical denies the allegations contained in paragraph thirty-seven.

38. LaRue Tactical admits the allegations contained in paragraph thirty-eight.

39. LaRue Tactical denies the allegations contained in paragraph thirty-nine.

40. LaRue Tactical denies the allegations contained in paragraph forty.

41. LaRue Tactical denies the allegations contained in paragraph forty-one.

42. LaRue Tactical reasserts the denials and admissions contained in the paragraphs referenced in paragraph forty-two.

43. LaRue Tactical denies the allegations contained in paragraph forty-three.

44. LaRue Tactical denies the allegations contained in paragraph forty-four.

45. LaRue Tactical denies the allegations contained in paragraph forty-five.

46. LaRue Tactical denies the allegations contained in paragraph forty-six.

47. LaRue Tactical reasserts the denials and admissions contained in the paragraphs referenced in paragraph forty-seven.

48. LaRue Tactical denies the allegations contained in paragraph forty-eight.

49. LaRue Tactical denies the allegations contained in paragraph forty-nine.

50. LaRue Tactical denies the allegations contained in paragraph fifty.

51. LaRue Tactical denies the allegations contained in paragraph fifty-one.

52. LaRue Tactical denies the allegations contained in paragraph fifty-two.

53. LaRue Tactical denies the allegations contained in paragraph fifty-three.

54. LaRue Tactical reasserts the denials and admissions contained in the paragraphs referenced in paragraph fifty-four.

55. LaRue Tactical denies the allegations contained in paragraph fifty-five.

56. LaRue Tactical denies the allegations contained in paragraph fifty-six.

57. LaRue Tactical denies the allegations contained in paragraph fifty-seven.

58. LaRue Tactical denies the allegations contained in paragraph fifty-eight.

59. LaRue Tactical denies the allegations contained in paragraph fifty-nine.

60. LaRue Tactical reasserts the denials and admissions contained in the paragraphs referenced in paragraph sixty.

61. LaRue Tactical denies the allegations contained in paragraph sixty-one.

62. LaRue Tactical denies the allegations contained in paragraph sixty-two.

63. LaRue Tactical denies the allegations contained in paragraph sixty-three.

64. LaRue Tactical denies the allegations contained in paragraph sixty-four.

65. LaRue Tactical denies the allegations contained in paragraph sixty-five.

66. LaRue Tactical reasserts the denials and admissions contained in the paragraphs referenced in paragraph sixty-six.

67. LaRue Tactical denies the allegations contained in paragraph sixty-seven.

68. LaRue Tactical denies the allegations contained in paragraph sixty-eight.

69. LaRue Tactical denies the allegations contained in paragraph sixty-nine.

70. LaRue Tactical denies the allegations contained in paragraph seventy.

71. LaRue Tactical denies the allegations contained in paragraph seventy-one.

72. LaRue Tactical denies the allegations contained in paragraph seventy-two.

73. LaRue Tactical denies the allegations contained in paragraph seventy-three.



74. LaRue Tactical denies the allegations contained in paragraph seventy-four.

75. LaRue Tactical denies the allegations contained in paragraph and seventy-five.

#### **REQUESTED RELIEF**

76. LaRue denies that Plaintiff is entitled to any of the relief requested in its prayer.

#### **AFFIRMATIVE DEFENSES**

Further answering, LaRue Tactical alleges as follows:

77. LaRue Tactical did not, and does not, directly infringe, indirectly infringe, contribute to or induce infringement of any valid or enforceable claim of U.S. Patent No. 4,845,871 (the '871 patent) and has not otherwise committed any act in violation of the patent laws of the United States, Title 35 U.S.C. §§ 100, *et seq.*, and more particularly, has not committed any act in violation of 35 U.S.C. § 271.

78. The '871 Patent is invalid because it fails to comply with one or more of the statutory requirements of patentability specified in Title 35 U.S.C. § 101 *et seq.*, including without limitation 35 U.S.C. §§ 102, 103, and 112.

79. A.R.M.S.'s alleged remedies are limited due to failures to comply with 35 U.S.C. § 287.

80. On information and belief, A.R.M.S. is equitably barred from enforcing the '871 patent against LaRue Tactical because of inequitable acts resulting from, among other things, breaches of the duty of candor by the named inventor on the '871 patent, the attorneys and/or agents associated with the prosecution of the '871 patent, and/or

others substantively involved in the prosecution of the application that resulted in the '871 patent.

81. The relief sought by A.R.M.S. is barred in whole or in part by the doctrine of laches.

82. The relief sought by A.R.M.S. is barred in whole or in part by doctrine of unclean hands and/or patent misuse.

83. By reason of the prosecution before the United States Patent and Trademark Office ("Patent Office") leading to the '871 patent, and by reason of admissions made by or on behalf of the applicant for this patent, A.R.M.S. is estopped from claiming infringement by LaRue Tactical of one or more claims of the '871 patent.

84. A.R.M.S. is equitably estopped from pursuing claims under the '871 patent.

85. LaRue Tactical did not, and does not, directly infringe, indirectly infringe, contribute to or induce infringement of U.S. Trademark Registration Nos. 3466163 and 3478909, in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

86. U.S. Trademark Registration Nos. 3466163 and 3478909 are invalid because they are functional, thus failing to comply with one or more of the statutory requirements under the Trademark Act of 1946, 15 U.S.C. §§ 1051 *et seq.* (also known as the Lanham Act).

87. LaRue Tactical did not, and does not, conduct acts that constitute federal unfair competition, false designation of origin, false and misleading descriptions and representations, and false advertising in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

88. LaRue Tactical did not, and does not, infringe, U.S. Trademark Registration No. 3385512, U.S. Trademark Registration No. 3466163 and U.S. Trademark Registration No. 3478909, in violation of Section 32(l) of the Lanham Act, 15 U.S.C. § 1114.

89. U.S. Trademark Registration No. 3385512 is invalid because it does not function as a trademark and fails to comply with one or more of the statutory requirements for registration under the Trademark Act of 1946, 15 U.S.C. §§ 1051 *et seq.* (also known as the Lanham Act).

90. LaRue Tactical did not, and does not, conduct acts that constitute unfair competition in violation of common law.

#### **COUNTERCLAIMS OF LARUE TACTICAL**

Defendant and Counterclaim Plaintiff LaRue Tactical plead the following counterclaims against Plaintiff and Counterclaim-Defendant A.R.M.S.

91. Austin Precision Products, Inc. d/b/a LaRue Tactical is a corporation organized and existing under the laws of Texas, having its principal place of business at 850 County Road 177, Leander, Texas 78641.

92. A.R.M.S. alleges that it is a corporation organized and existing under the laws of the Commonwealth of Massachusetts, having its principal place of business at 230 West Center Street, West Bridgewater, Massachusetts.

#### **JURISDICTION AND VENUE**

93. This court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 11331 and 1338 (a) because the action concerns a federal question relating

to patents arising under Title 35 of the United States Code and pursuant to 28 U.S.C. §§ 2201 and 2202 because this is a civil action for a declaratory judgment.

94. This Court has personal jurisdiction over A.R.M.S. by virtue of its having submitted to the jurisdiction of this Court by filing the underlying lawsuit.

95. Venue is proper under 28 U.S.C. §§ 1391 and 1400.

## **CLAIMS FOR RELIEF**

### **DECLARATORY JUDGMENT COUNTERCLAIMS**

96. LaRue Tactical incorporates by reference the allegations of paragraphs 1-30 above as though fully set forth herein.

97. LaRue Tactical did not and does not directly infringe, indirectly infringe, contribute to or induce infringement of any valid or enforceable claim of the '871 patent, and has not otherwise committed any acts in violation of 35 U.S.C. §271.

98. The '871 patent is invalid for failing to meet the conditions for patentability set forth at 35 U.S.C. § 101 et. seq., including, without limitation 35 U.S.C. §§ 102, 103 and/or 112.

99. On information and belief, the '871 patent is unenforceable under the doctrine of inequitable conduct due to breaches of the duty of candor by either the named inventor of the '871 patent, the attorneys and/or agents associated with the prosecution of the '871 patent, and/or others substantively involved in the prosecution of the application resulting in the '871 patent.

100. An actual controversy exists between LaRue Tactical and A.R.M.S. concerning the alleged infringement, the validity, and the unenforceability of the '871 patent by virtue of A.R.M.S.'s allegation of infringement.

101. LaRue Tactical is entitled to judgment from this Court that the '871 patent is not infringed by LaRue Tactical, is invalid, and is not enforceable.

102. On information and belief, A.R.M.S. is and has been engaging in unfair competition, trade disparagement and commercial libel of LaRue Tactical. LaRue Tactical is entitled to disgorgement of A.R.M.S.'s profits, damages sustained by LaRue Tactical, costs of action, and treble damages, together with reasonable attorney fees. 15 U.S.C. § 1117.

103. This is an exceptional case entitling LaRue Tactical to an award of its attorneys' fees incurred in connection with this action pursuant to 35 U.S.C. § 285.

104. U.S. Trademark Registration No. 3385512 is invalid and fails to function as a mark in violation of Sections 1, 2, and 45 of the Lanham Act, 15 U.S.C. §§ 1051, 1052 and 1127.

105. Even if U.S. Trademark Registration No. 3385512 is used as a mark, it is not inherently distinctive and has not acquired distinctiveness in violation of Sections 1, 2, and 45 of the Lanham Act, 15 U.S.C. §§ 1051, 1052 and 1127.

106. U.S. Trademark Registration Nos. 3466163 and 3478909 are invalid because the marks are functional in violation of Sections 1, 2, and 45 of the Lanham Act, 15 U.S.C. §§ 1051, 1052 and 1127.

107. Even if U.S. Trademark Registration Nos. 3466163 and 3478909 are used as marks, they are not inherently distinctive and have not acquired distinctiveness in violation of Sections 1, 2, and 45 of the Lanham Act, 15 U.S.C. §§ 1051, 1052 and 1127.

108. U.S. Trademark Registration Nos. 3466163 and 3478909 are invalid because the '871 patent discloses the utilitarian advantages of the designs sought to be registered under the marks in violation of Sections 1, 2, and 45 of the Lanham Act, 15 U.S.C. §§ 1051, 1052 and 1127.

**PRAYER**

WHEREFORE, PREMISES CONSIDERED, LaRue Tactical prays that for an Order and Judgment from this Honorable Court:

- A. declaring that LaRue Tactical does not infringe any claim of the '871 patent;
- B. declaring that each and every claim of the '871 patent is invalid;
- C. declaring that the '871 patent is unenforceable;
- D. declaring that LaRue Tactical does not infringe the #17<sup>®</sup> trademark;
- E. declaring that the A.R.M.S. trade dress is invalid due to its functionality;
- F. declaring that LaRue Tactical has not committed any acts that constitute trade dress infringement in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a);
- G. disgorging A.R.M.S.'s profits, damages sustained by LaRue Tactical, costs of action, and treble damages, together with reasonable attorney fees and other relief as provided under 15 U.S.C. § 1117
- H. declaring that LaRue Tactical has not committed any acts that constitute unfair competition, false designation of origin and false advertising in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a);

I. declaring that LaRue Tactical has not committed any acts that constitute unfair competition in violation of common law;

J. declaring that A.R.M.S. is not entitled to any monetary damages, royalties or profits;

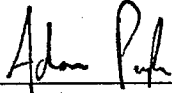
K. adjudging that A.R.M.S. is not entitled for any injunctive relief sought by A.R.M.S.;

L. adjudging this case is "exceptional" within the meaning of 35 U.S.C. § 285, entitling LaRue Tactical to an award of its reasonable attorneys' fees, expenses and costs; and

M. granting such other and further equitable or legal relief as the Court deems just and proper.

Respectfully submitted,

SLATER, KENNON & JAMESON, LLP  
4807 Spicewood Springs Road  
Building 2, Suite 240  
Austin, TX 78759  
(512) 472-2431 (Phone)  
(512) 472-0432 (Facsimile)

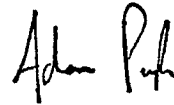
By:   
David G. Slater  
Texas Bar No. 18481800  
Adam Pugh  
Texas Bar No. 24044341

**ATTORNEYS FOR DEFENDANT AUSTIN  
PRECISION PRODUCTS, INC. d/b/a  
LARUE TACTICAL**

**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and correct copy of the foregoing Answer of Defendant to be served on this 24 day of July, 2009 on counsel for Plaintiff as follows:

Craig M. Scott  
Christine K. Bush  
SCOTT & BUSH LTD.  
30 Kennedy Plaza, 4<sup>th</sup> Floor  
Providence, RI 02903  
(401) 865-6035  
(401) 865-6039 (fax)  
**VIA FACSIMILE and CM/ECF**

A handwritten signature in black ink, appearing to read "Adam Pugh".



**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

ATLANTIC RESEARCH MARKETING  
SYSTEMS, INC.

Plaintiffs,

v.

AUSTIN PRECISION PRODUCTS, INC.  
d/b/a LARUE TACTICAL

Defendant.

LEAVE TO FILE GRANTED  
ON MARCH 11, 2010

Civil Action No. 09-10034 (DPW)

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**SECOND AMENDED COMPLAINT**

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Plaintiff, Atlantic Research Marketing Systems, Inc. (“A.R.M.S.”), brings this action against defendant, Austin Precision Products, Inc. d/b/a LaRue Tactical (“LaRue Tactical”) for patent infringement, trade dress infringement, trademark infringement, common law unfair competition, defamation, commercial disparagement, tortious interference with contractual and/or prospective business relations, and unfair competition under Mass. Gen. Laws ch. 93A. By this Second Amended Complaint, A.R.M.S. seeks, *inter alia*, injunctive relief and monetary damages and alleges as follows:

**PARTIES**

1. A.R.M.S. is a Massachusetts corporation with its principal place of business located at 230 W. Center Street, West Bridgewater, Massachusetts. A.R.M.S. manufactures, markets and sells innovative small arms accessories designed and developed by its founder, president and Chief Executive Officer, Richard Swan. A.R.M.S.’ products are sold domestically

and internationally for military, government and civilian use through several channels, such as retailers, distributors, internet sales and mail order catalogs.

2. Upon information and belief, LaRue Tactical is a Texas corporation with its principal place of business located at 850 County Road 177, Leander, Texas. Upon information and belief, LaRue Tactical manufactures, markets and sells small arms accessories. Upon information and belief, LaRue Tactical has sold and continues to sell its products in Massachusetts and throughout the United States through several channels, such as retailers, distributors, mail order catalogs and over the internet.

### **JURISDICTION AND VENUE**

3. This Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1338(a) and (b), and has supplemental jurisdiction over the state law and common law causes of action pursuant to 28 U.S.C. § 1367.

4. The Court also has jurisdiction over this matter pursuant to 28 U.S.C. § 1332(a) because the parties are citizens of different states and the amount in controversy exceeds \$75,000.00, exclusive of interest and costs.

5. This Court has personal jurisdiction over LaRue Tactical because, upon information and belief, LaRue Tactical does business in Massachusetts and markets and sells infringing products in Massachusetts.

6. Venue is proper under 28 U.S.C. § 1391(b) and (c) and 28 U.S.C. § 1400(b).

### **A.R.M.S., Its Products and Intellectual Property**

7. For over thirty years, A.R.M.S. and Richard E. Swan have designed, manufactured, marketed and/or sold small arms accessories, and other mount interface devices for commercial and military uses. Mr. Swan has invented and patented numerous devices for

small arms products, and crew-served weaponry, such as iron sights, mounts, rail platforms, sleeved rails, dovetail rails, anti-armor mounts and grenade launcher mounts.

8. Among other things, A.R.M.S. develops and manufactures distinctive, high quality weapon mounts for use in attaching to weapon platforms: flashlights, pistol grips, bipods, slings, optical lens sights, holographic lens sights, laser sights, and night vision devices in the nature of infrared detectors, invisible light projectors, thermal imaging, sensors, cameras and scopes.

9. For over twenty years, A.R.M.S. exclusively has used an actuator platform extending from the side of many of its weapon mount configurations (the “Lever Mount System”). Consumers of weapon mounts associate the Lever Mount System with A.R.M.S.

10. To protect the substantial goodwill associated with the design of its weapon mounts, Mr. Swan applied for and received a trademark registration from the United States Patent and Trademark Office (“PTO”) for its distinctive Lever Mount System (the “Lever Mount Trade Dress”). (A true copy of U.S. Trademark Reg. No. 3,466,163, granted July 15, 2008, reflecting a first-use in commerce on June 1, 1998, is attached hereto as Exhibit A.) Mr. Swan granted A.R.M.S. an exclusive license to make, use, market and sell the Lever Mount Trade Dress.

11. A.R.M.S. also manufactures, markets and sells a specific type of dovetail weapon mount, branded with the trademark, #17®, that features a rectangular base portion having a substantially semi-circular actuator platform extending from one side thereof.

12. A.R.M.S. distinguishes its #17® brand in the marketplace by offering a dovetail weapon mount with superior design, performance, functionality and durability.

13. A.R.M.S. first used the trademark, #17®, in commerce on June 1, 1998 in connection with this particular type of weapon mounts and has been using it in commerce continuously since then.

14. During its long, widespread and continuous use of the #17® brand, A.R.M.S. has expended considerable sums of money to advertise and promote the #17® brand. The #17® brand has been prominently featured throughout the United States and the world in brochures, industry publications and on its web site.

15. Through its promotion, advertising and quality of products, A.R.M.S. has developed considerable goodwill in its #17® brand, which is widely associated by consumers as weapon mounts manufactured and sold by A.R.M.S.

16. To protect the substantial goodwill associated with its products, Mr. Swan applied for and received a trademark registration from the PTO for its #17® trademark. (A true copy of U.S. Trademark Reg. No. 3,385,512, granted February 19, 2008, reflecting first-use in commerce on June 1, 1998, is attached as Exhibit B.) Mr. Swan granted A.R.M.S. an exclusive license to exploit the #17® trademark.

17. The #17® brand is recognized and relied on as identifying A.R.M.S. as the sole source of goods designated with the #17® mark and has become widely known amongst consumers and weapon mount industry as identifying high quality dovetail weapon mounts originating from Plaintiff. Accordingly, the #17® mark is a valuable commercial asset.

18. Additionally, to protect the substantial goodwill associated with the design of the A.R.M.S. #17® weapon mount product, Mr. Swan applied for and received a trademark registration from the PTO for its distinctive mounting platform (the “#17® Mounting Platform Trade Dress”). (A true copy of U.S. Trademark Registration Reg. No. 3,478,909, granted August

5, 2008, reflecting first-use in commerce on June 1, 1998, is attached as Exhibit C.) Mr. Swan granted A.R.M.S. an exclusive license to make, use, market and sell the #17® Mounting Platform Trade Dress registration to A.R.M.S. (The Lever Mount Trade Dress and the #17® Mounting Platform Trade Dress collectively shall be referred to as the “Trade Dress.”)

19. The Trade Dress is unique in the weapon mount marketplace, examples of which are illustrated in Exhibits D and E attached hereto.

20. The Trade Dress creates a unique commercial impression and sets A.R.M.S.’ weapon mounts apart from those offered by other manufacturers. Consumers of weapon mounts associate the Trade Dress as originating from A.R.M.S.

21. In an effort to promote among weapon mount consumers a conscious connection between the Trade Dress and A.R.M.S., A.R.M.S. has expended considerable sums to advertise and promote the Trade Dress and its associated products. The Trade Dress has been prominently featured throughout the United States in press releases, industry publications and trade shows, and on its website.

22. Certain of A.R.M.S.’ dovetail weapon mounts also incorporate a specific type of lever system known as a Throw Lever®. On July 11, 1989, the PTO issued to Mr. Swan U.S. Patent No. 4,845,871 (the “‘871 patent”). (A true copy of the ‘871 patent is attached hereto as Exhibit F.) Mr. Swan granted A.R.M.S. an exclusive right to exploit the ‘871 patent. The ‘871 patent expired on April 19, 2008.

23. A.R.M.S. has had great success selling its weapon mounts incorporating the patented Throw Lever®.

24. A.R.M.S.’ patented weapon mounts are a valuable asset of A.R.M.S. and a principal source of the company’s goodwill.

LaRue Tactical's Products and Infringement of the Trade Dress

25. LaRue Tactical manufactures, markets, sells and/or offers to sell, among other things, weapon mounts through retailers, distributors, mail order catalogs and over the internet.

26. LaRue Tactical is engaging in the unauthorized use of the Trade Dress in connection with the sale of weapon mounts. Select examples of LaRue Tactical's infringing use of the Trade Dress are attached as Exhibit G.

27. LaRue Tactical's infringing use of the Trade Dress in connection with the manufacture and distribution of weapon mounts is calculated to deceive consumers into believing that LaRue Tactical's products are provided by, originated from or are associated with A.R.M.S.

28. LaRue Tactical's use of the Trade Dress in connection with weapon mounts is likely to cause confusion with consumers and customers within the small arms industry.

29. Upon information and belief, LaRue Tactical intentionally copied the Trade Dress.

30. Upon information and belief, LaRue Tactical is attempting to confuse and mislead weapon mount consumers by offering for sale, advertising and selling its weapon mounts through retailers, trade shows, catalogs and on the internet.

31. Upon information and belief, LaRue Tactical misappropriated the Trade Dress for the express purpose of trading on A.R.M.S.' well-known and distinctive Trade Dress.

Infringement of the #17® Trademark

32. LaRue Tactical is manufacturing, marketing, selling and/or offering to sell weapon mounts bearing the #17® mark.

33. LaRue Tactical's use of the #17® mark in connection with weapon mounts implies, falsely, that it manufactures and sells #17® weapon mounts. (A true copy of a website printout featuring the "LaRue Tactical Surefire 17 Upgrade LT-170" is attached hereto as Exhibit H.)

34. LaRue Tactical's use of the #17® brand in connection with weapon mounts is calculated to deceive consumers into believing that LaRue Tactical's weapon mounts are provided by or associated with A.R.M.S.

35. LaRue Tactical's use of the #17® brand in connection with weapon mounts is likely to cause confusion with consumers and customers within the small arms industry.

36. Further, upon information and belief, LaRue Tactical is using the #17® mark in connection with weapon mounts for the express purpose of trading on A.R.M.S.' well-known and respected #17® brand.

Infringement of the '871 Patent

37. LaRue Tactical is manufacturing, marketing, selling and/or offering to sell weapon mounts incorporating a so-called "speed lever" (the "Accused Products").

38. The Accused Products infringe one or more of the claims of the '871 patent.

39. A.R.M.S. wrote to LaRue Tactical demanding that it immediately cease and desist its sale of the Accused Products. Notwithstanding this, LaRue Tactical continued to market and sell the Accused Products.

40. LaRue Tactical intentionally infringed the '871 patent by manufacturing, marketing, selling and/or offering for sale the Accused Products in the United States, including Massachusetts.

41. LaRue Tactical's wrongful actions were conducted without authorization or license.

42. LaRue Tactical had prior knowledge of the '871 patent, and therefore its conduct is both willful and deliberate.

LaRue Tactical's Defamatory Statements

43. On or about July 18, 2009, an internet dialog titled "ARMS vs. Troy Federal Court Awards ARMS \$1.8 Million For Theft of Secrets" (the "Thread") began.

44. Upon information and belief, the Thread was available for review, and was viewed by individuals associated with the small arms accessories industry, including customers, prospective customers and supplier of A.R.M.S.

45. Upon information and belief, Larue Tactical participated in the Thread under the moniker "LaRue\_Tactical."

46. LaRue Tactical made numerous statements in the Thread concerning this litigation, A.R.M.S. and A.R.M.S.' products. A true copy of LaRue Tactical's comments on the Thread is attached hereto as Exhibit I.

47. On or about July 21, 2009, LaRue Tactical made false and defamatory statements in the Thread stating that A.R.M.S.' products frequently failed, that it was "criminal" that A.R.M.S. products were being installed on combat items, that A.R.M.S. products endangered the lives of American soldiers, and that A.R.M.S. products endangered missions conducted in America's war on terror.

48. On or about July 22, 2009, LaRue Tactical made false and defamatory statements in the Thread stating that it had corroborating information showing that A.R.M.S.' products endangered American soldiers and missions.



49. On or about July 23, 2009, LaRue Tactical made false and defamatory statements in the Thread stating that A.R.M.S. had engaged in a practice of fraudulently threatening litigation.

50. On or about July 24, 2009 at approximately noon, LaRue Tactical made false and defamatory statements in the Thread stating that A.R.M.S. products were manufactured in China.

51. Upon information and belief, LaRue has participated in other internet dialogs concerning A.R.M.S. and A.R.M.S.' products and has made other false and defamatory statements.

52. Indeed, since mid-2009, LaRue Tactical has effectively stalked A.R.M.S. over the internet, engaging in a persistent and malicious on-line campaign designed to improperly defame A.R.M.S., disparage its products, interfere with its customer base and prospective customer base, and cause pecuniary and other harm to A.R.M.S. and its business. LaRue Tactical has done so by making, and then facilitating and/or encouraging others to make, false, misleading and/or disparaging comments about A.R.M.S. and its products.

53. LaRue Tactical's internet campaign has been pervasive and unrelenting, and has included false, misleading and/or disparaging comments about the quality of A.R.M.S.' products and the integrity of A.R.M.S.' business practices. For example, LaRue Tactical has falsely, misleadingly and/or disparagingly stated in public on-line chat rooms that:

- a. A.R.M.S. products are substandard or inferior;
- b. A.R.M.S. products are defective and unfit for intended use;
- c. A.R.M.S. products experience a 20% failure rate;
- d. A.R.M.S. products spontaneously break;

- e. A.R.M.S. products fail in combat, cause deaths of American soldiers, impair U.S. military operations, cause mission failures, or otherwise impede American War efforts;
- f. A.R.M.S. products are made in China, not the U.S.A.;
- g. A.R.M.S. engages in fraudulent business practices by threatening and/or filing frivolous litigation against its competitors; and
- h. it is “criminal” to allow the use of A.R.M.S.’ Throw Lever products at issue in this suit.

54. LaRue Tactical has also wrongfully enticed other persons to defame and/or disparage A.R.M.S., its employees and its products by concocting an internet-based lever mount exchange program intended to, among other things, disseminate negative publicity and generate ill-will towards A.R.M.S. and its products. LaRue Tactical’s campaign has even led to the public dissemination of postings which contain threats and intimidation against A.R.M.S. and certain of its employees.

**COUNT I**  
**(Infringement of the ‘871 Patent—35 U.S.C. §271)**

55. A.R.M.S. realleges and incorporates by reference paragraphs 1 through 54 as if fully set forth herein.

56. Defendant knowingly and intentionally infringed the ‘871 patent.

57. A.R.M.S. has suffered substantial damage as a result of Defendant’s infringement of the ‘871 patent including, but not limited to, the loss of commercial value of its Throw Lever® product line, loss of the value of its patent, loss of goodwill, and other injuries to A.R.M.S.’ business.

58. A.R.M.S. is entitled to an accounting of defendant's profits derived from the sale of the Accused Products.

59. Defendant committed such acts in an intentional and willful manner that make this case exceptional under 35 U.S.C. § 285.

**COUNT II**  
**(Federal Trade Dress Infringement—15 U.S.C. §1125(a))**

60. A.R.M.S. realleges and incorporates by reference paragraphs 1 through 59 as if fully set forth herein.

61. Defendant, without the consent of A.R.M.S., has used, and is using, in commerce A.R.M.S.' Trade Dress in connection with the sale and offering for sale of weapon mounts, which use is likely to cause confusion, or to cause mistake or to deceive.

62. Upon information and belief, Defendant had actual knowledge of A.R.M.S.' ownership and prior use of the Trade Dress and, without consent of A.R.M.S., has used, and is using, the Trade Dress with the intent to trade upon A.R.M.S.' reputation and goodwill by causing confusion and mistake among customers and the public, and by deceiving them.

63. Defendant's acts constitute trade dress infringement in violation of Section 43(a) of the Lanham Act, 15 U.S.C. §1125(a).

64. Defendant's acts are intentional, willful and in bad faith.

65. The aforesaid acts of Defendant have caused, and are causing irreparable harm and damage to A.R.M.S., and unless preliminary and permanently restrained by this Court, said irreparable injury will continue.

66. A.R.M.S. has no adequate remedy at law.

**COUNT III**  
**(Federal Unfair Competition, False Designation of Origin and**  
**False Advertising—15 U.S.C. §1125(a))**

67. A.R.M.S. realleges and incorporates by reference paragraphs 1 through 66 as if fully set forth herein.

68. The aforesaid acts of Defendant constitute the intentional use of words, terms, names, symbols and devices and combinations thereof, false designations of origin, and false and misleading representations of fact that are likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection or association of Defendant with A.R.M.S., or as to the origin, sponsorship or approval of Defendant's products.

69. The aforesaid acts of Defendant constitute the use of words, terms, names, symbols and devices and combinations thereof, false designations of origin, and false and misleading representations of fact that in commercial advertising or promotion, misrepresent the nature, characteristics or qualities of Defendant's products or other commercial activities.

70. The aforesaid acts of Defendant constitute false designation of origin, false and misleading descriptions and representations, federal unfair competition and false advertising in violation of Section 43(a) of the Lanham Act, 15 U.S.C. §1125(a).

71. The aforesaid acts of Defendant have caused, and are causing, great and irreparable harm and damage to A.R.M.S., and unless preliminarily and permanently restrained by this Court, said irreparable injury will continue.

72. A.R.M.S. has no adequate remedy at law.

**COUNT IV**  
**(Federal Trademark Infringement—15 U.S.C. §1114)**

73. A.R.M.S. realleges and incorporates by reference paragraphs 1 through 72 as if fully set forth herein.

74. Defendant, without the consent of A.R.M.S., has used in commerce marks confusingly similar and/or identical to A.R.M.S.' federally-registered #17® trademark in connection with the sale and offering for sale of weapon mounts, which use is likely to cause confusion, or to cause mistake or to deceive.

75. Defendant's acts constitute trademark infringement in violation of Section 32(1) of the Lanham Act, 15 U.S.C. § 1114.

76. Defendant's acts are intentional, willful and in bad faith.

77. The aforesaid acts of Defendant have caused, and are causing, great and irreparable harm and damage to A.R.M.S., and unless preliminarily and permanently restrained by this Court, said irreparable injury will continue.

78. A.R.M.S. has no adequate remedy at law.

**COUNT V**  
**(Common Law Unfair Competition)**

79. A.R.M.S. realleges and incorporates by reference paragraphs 1 through 78 as if fully set forth herein.

80. Defendant's aforesaid acts are a violation and derogation of A.R.M.S.' common law rights and are likely to cause confusion, mistake and deception among consumers and the public as to the source, origin, sponsorship, or quality of Defendant's products, and Defendant's aforesaid acts are likely to cause confusion, mistake and deception among consumers and the public as to Defendant's affiliation with or sponsorship by A.R.M.S. of Defendant's aforesaid acts.

81. Defendant's aforesaid acts are causing loss, damage and injury to A.R.M.S. and to the purchasing public.

82. Defendant knows, or in the exercise of reasonable care should know, that its conduct is likely to so mislead the public.

83. The foregoing conduct by Defendant has been knowing, deliberate, willful, intended to cause mistake or to deceive, and in disregard of A.R.M.S.' rights.

84. Defendant's wrongful acts, as alleged above, have permitted or will permit it to make substantial sales and profits on the strength of A.R.M.S.' nationwide and international marketing, advertising, sales and consumer recognition.

85. As a direct and proximate result of Defendant's wrongful conduct, as alleged above, A.R.M.S. has been and will be deprived of substantial sales of products and services in an amount as yet unknown but to be proved at trial, and has been and will be deprived of the value of its registered trade dress, trademarks and brand in an amount as yet unknown, but to be determined at trial.

86. The aforesaid acts of Defendant constitute unfair competition in violation of common law.

87. The aforesaid acts of Defendant have caused and are causing irreparable harm and damage to A.R.M.S., and unless preliminarily and permanently restrained by this Court, said irreparable injury will continue.

88. A.R.M.S. has no adequate remedy at law.

**COUNT VI**  
**(Defamation)**

89. A.R.M.S. realleges and incorporates by reference paragraphs 1 through 88 as if fully set forth herein.

90. A.R.M.S. is not a public figure.

91. LaRue Tactical made and published false and defamatory statements about A.R.M.S. on the Thread to third persons, including, but not limited to, customers and prospective customers of A.R.M.S.

92. The false and defamatory statements made and published by LaRue Tactical are reasonably susceptible of a defamatory meaning.

93. The false and defamatory statements made and published by LaRue Tactical would tend to hold A.R.M.S. up to scorn, ridicule or contempt in the minds of to third persons, including, but not limited to, A.R.M.S.' customers and prospective customers.

94. Upon information and belief, LaRue Tactical made and published such false and defamatory information with at least negligent care for the veracity of the information.

95. Upon information and belief, LaRue Tactical made and published such false and defamatory information with malice or reckless disregard for the veracity of the information.

96. LaRue Tactical published such false and defamatory information in writing.

97. The false and defamatory statements made and published by LaRue Tactical were defamatory per se.

98. Tactical, A.R.M.S. has suffered both general damages to its reputation and special damages.

**COUNT VII**  
**(Commercial Disparagement)**

99. A.R.M.S. realleges and incorporates by reference paragraphs 1 through 98 as if fully set forth herein.

100. LaRue Tactical's statements as specified in paragraphs 43-54 and 90-98 above are false and untrue, and disparaged A.R.M.S.' products and business practices.

101. By posting and allowing the posting of the statements on the internet, LaRue Tactical published the false and disparaging statements to a wide range of persons in the public.

102. LaRue Tactical negligently published the false and disparaging statements causing certain customers to regard A.R.M.S.' products as dangerous, and imputing reprehensible conduct to A.R.M.S.

103. LaRue Tactical published the false and disparaging statements about A.R.M.S.' products, causing A.R.M.S. to suffer special and general damages, including the monetary loss of at least one important and valuable client, and injury to the reputation of A.R.M.S. and its products.

104. LaRue Tactical published the false and disparaging statements with knowledge that the statements were false, or with reckless disregard as to the falsity thereof.

**COUNT VIII**  
**(Tortious Interference with Contractual and/or Prospective Business Relations)**

105. A.R.M.S. realleges and incorporates by reference paragraphs 1 through 104 as if fully set forth herein.

106. A.R.M.S. had existing contractual and/or prospective advantageous business relations with readers of the ar15.com blog that LaRue Tactical knew or should have known were profitable or potentially profitable to A.R.M.S.

107. After the filing of this lawsuit, LaRue Tactical knowingly and intentionally took actions, including but not limited to those specified in paragraphs 43-54 and 90-98 above, with improper motive and means, and with intent to gain unfair advantage in the marketplace, that interfered with A.R.M.S.' contractual and/or prospective advantageous business relations.

108. As a direct result of LaRue Tactical's wrongful actions, A.R.M.S. has suffered, and continues to suffer, damages in an amount to be determined at trial.



**COUNT IX**  
**(Violation of Mass. Gen. Laws c. 93A)**

109. A.R.M.S. realleges and incorporates by reference paragraphs 1 through 108 as if fully set forth herein.

110. LaRue Tactical is engaged in trade or commerce within the Commonwealth of Massachusetts.

111. LaRue Tactical committed unfair methods of competition and deceptive acts or practices in trade or commerce by knowingly and willfully making and publishing false and defamatory statements about A.R.M.S.

112. LaRue Tactical committed unfair methods of competition and deceptive acts or practices in trade or commerce by using marks that are confusingly similar and/or identical to the marks used by A.R.M.S.

113. LaRue Tactical committed unfair methods of competition and deceptive acts or practices in trade or commerce by making false, misleading and disparaging statements about A.R.M.S.' products and business practices.

114. LaRue Tactical committed unfair methods of competition and deceptive acts or practices in trade or commerce by wrongfully interfering with A.R.M.S.' contractual and/or prospective advantageous business relations.

115. Such actions constitute unfair and deceptive acts in trade or commerce in violation of Mass. Gen. Law 93A.

116. LaRue Tactical's unfair methods of competition and deceptive acts and practices in trade or commerce have caused A.R.M.S. to suffer financial damage.

117. LaRue Tactical's unfair methods of competition and deceptive acts and practices in trade or commerce will continue to injure A.R.M.S. unless enjoined.

118. LaRue Tactical's unfair and deceptive acts and practices in trade or commerce have been willful violations.

**RELIEF REQUESTED**

WHEREFORE, Plaintiff, Atlantic Research Marketing Systems, Inc. prays for judgment in its favor and against Defendant Austin Precision Products, Inc. d/b/a LaRue Tactical, and requests that:

- A. Judgment enter in its favor and against Defendant on each Count of the Complaint;
- B. Defendant be adjudged to have infringed the '871 patent and that such infringement be adjudged to have been willful;
- C. A.R.M.S. be awarded damages in an amount no less than a reasonable royalty for Defendant's infringement of the '871 patent;
- D. A.R.M.S. be awarded treble damages pursuant to 35 U.S.C. § 284 because of the willful nature of Defendant's acts;
- E. A.R.M.S. be awarded prejudgment interest;
- F. A.R.M.S. be awarded its costs, attorneys' fees, and expenses in this suit under 35 U.S.C. § 285;
- G. Defendant, and each of its officers, directors, agents, servants, employees and representatives, and those persons in active concert or participation with them or any of them, be preliminarily and permanently enjoined and restrained from:
  - (1) using on or in connection with the advertising, promotion, offering for sale, sales or distribution of small arms products, the #17® Mark or any variations thereof that are confusingly similar to Plaintiff's #17® Mark;

(2) using on or in connection with the advertising, promotion, offering for sale, sales or distribution of small arms products, the Trade Dress or any variations thereof or anything confusingly similar thereto;

(3) representing by any means whatsoever, directly or indirectly, or doing any other act (or things calculated or likely to cause confusion, mistake or to deceive consumers into believing that Defendant's products are those of A.R.M.S., or that there is any affiliation or connection between A.R.M.S. or its products and Defendant or its products, and from otherwise unfairly competing with Plaintiff);

(4) causing to be advertised, published or disseminated by any means any false or misleading representations as to the existence of any relationship between Defendant and A.R.M.S. or between any products of Defendant and any products and services of A.R.M.S.;

(5) disparaging A.R.M.S.' products and business practices;

(6) interfering with A.R.M.S.' contractual and/or prospective advantageous business relations;

H. A.R.M.S. recover its damages sustained as a result of Defendant's infringement, unfair competition and false designation of origin under federal, state and common law, commercial disparagement, and tortious interference with A.R.M.S.' contractual and/or prospective advantageous business relations, together with an accounting of Defendant's profits arising from such activities, and that the Court exercise its discretion and enter a judgment for such additional sums as the Court shall find to be just, according to the egregious, willful and intentional nature of the acts of Defendant;

I. Defendant be required to: (1) surrender for destruction, or other disposition at the election of A.R.M.S., all extrusions, molds, dies, components-in-progress, components,

production materials, products, castings, fixtures, prints, computer programs, solid modeling, prototypes, engineering records and all means of manufacture associated with the production of products that infringe A.R.M.S.' Trade Dress; and (2) recall from any and all channels of trade, any and all advertising or promotional materials using the #17® mark and/or the Trade Dress in connection with small arms products or any variations thereof that are confusingly similar to Plaintiffs mark and/or Trade Dress, and to take affirmative steps to dispel any false suggestion of a connection to A.R.M.S. by virtue of its activities, including, but not limited to, all necessary and appropriate corrective advertising measures;

J. A.R.M.S. recovers treble damages under 15 U.S.C. § 1117;

K. A.R.M.S. recovers its reasonable attorneys' fees pursuant to 15 U.S.C. § 1117;

L. Defendant, and each of its officers, directors, agents, servants, employees and representatives, and those persons in active concert or participation with them or any of them, be preliminarily and permanently enjoined and restrained from making any further false, defamatory and disparaging statements against A.R.M.S.;

M. Defendant be required to take affirmative steps to dispel the false, defamatory and disparaging statements published by it, including, but not limited to, all necessary and appropriate corrective advertising measures;

N. A.R.M.S. recovers all general damages to its reputation incurred as a result of Defendant's false, defamatory and disparaging statements;

O. A.R.M.S. recovers special damages incurred as a result of Defendant's false, defamatory and disparaging statements;

P. A.R.M.S. recovers all attorneys' fees expended as a result of Defendant's false, defamatory and disparaging statements;

Q. A.R.M.S. recovers all attorneys' fees expended as result of LaRue Tactical's violation of Mass. Gen. Law c. 93A.

R. A.R.M.S. recovers treble damages as a result of LaRue Tactical's violation of Mass. Gen. Laws c. 93A.

S. A.R.M.S. recovers its costs and disbursements herein; and

T. A.R.M.S. be awarded such other and further relief as this Court may deem just and proper.

**DEMAND FOR JURY TRIAL**

A.R.M.S. requests a trial by jury on all issues so triable.

**ATLANTIC RESEARCH MARKETING  
SYSTEMS, INC.,**

Date: March 15, 2010

By: /s/ Paul J. Cronin  
Paul J. Hayes (BBO# 227,000)  
[pjhayes@mintz.com](mailto:pjhayes@mintz.com)  
Paul J. Cronin (BBO# 641,230)  
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617-542-6000 (telephone)  
617-542-2241 (facsimile)

**CERTIFICATE OF SERVICE**

I hereby certify that on March 15, 2010, a true copy of the foregoing document was filed through the ECF system and will be sent electronically to the registered counsel as identified on the Notice of Electronic Filing (NEF):

/s/ Paul J. Cronin

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

ATLANTIC RESEARCH MARKETING )  
SYSTEMS, INC., )

Plaintiff, )

v. )

AUSTIN PRECISION PRODUCTS, INC. )  
d/b/a LARUE TACTICAL, )

Defendant. )

Civil Action No.: 1:09-CV-10034 DPW

**ANSWER AND COUNTERCLAIMS**  
**TO SECOND AMENDED COMPLAINT**

Defendant Austin Precision Products, Inc., d/b/a LaRue Tactical (“LaRue Tactical”) hereby responds to the Second Amended Complaint of Plaintiff, Atlantic Research Marketing Systems, Inc. (“A.R.M.S.”) as follows. No answer is required with respect to the introduction paragraph of the Plaintiff’s Complaint. To the extent that one is required, the allegations are denied.

**PARTIES**

1. LaRue Tactical lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1 and therefore denies them.
2. LaRue Tactical admits the allegations in paragraph 2.

**JURISDICTION AND VENUE**

3. LaRue Tactical admits the allegations in paragraph 3.

4. LaRue Tactical lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 and therefore denies them.
5. LaRue Tactical denies the allegations in paragraph 5 to the extent it alleges that LaRue Tactical markets and sells “infringing” products in Massachusetts. Subject to such denial of the term “infringing,” LaRue Tactical admits the allegations in paragraph 5.
6. LaRue Tactical admits the allegations in paragraph 6.

### **FACTS**

7. LaRue Tactical lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 7 and therefore denies them.
8. LaRue Tactical lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8 and therefore denies them.
9. LaRue Tactical lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 9 and therefore denies them.
10. LaRue Tactical lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 10 and therefore denies them.
11. LaRue Tactical lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 11 and therefore denies them.
12. LaRue Tactical lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 12 and therefore denies them.
13. LaRue Tactical lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 13 and therefore denies them.
14. LaRue Tactical lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 14 and therefore denies them.

15. LaRue Tactical lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 15 and therefore denies them.
16. LaRue Tactical lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 16 and therefore denies them.
17. LaRue Tactical lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 17 and therefore denies them.
18. LaRue Tactical lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 18 and therefore denies them.
19. LaRue Tactical lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 19 and therefore denies them.
20. LaRue Tactical lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 20 and therefore denies them.
21. LaRue Tactical lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 21 and therefore denies them.
22. LaRue Tactical lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 22 and therefore denies them.
23. LaRue Tactical lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 23 and therefore denies them.
24. LaRue Tactical lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 24 and therefore denies them.
25. LaRue Tactical admits the allegations in paragraph 25.
26. LaRue Tactical denies the allegations in paragraph 26.
27. LaRue Tactical denies the allegations in paragraph 27.



28. LaRue Tactical denies the allegations in paragraph 28.
29. LaRue Tactical denies the allegations in paragraph 29.
30. LaRue Tactical denies the allegations in paragraph 30.
31. LaRue Tactical denies the allegations in paragraph 31.
32. LaRue Tactical denies the allegations in paragraph 32.
33. LaRue Tactical denies the allegations in paragraph 33.
34. LaRue Tactical denies the allegations in paragraph 34.
35. LaRue Tactical denies the allegations in paragraph 35.
36. LaRue Tactical denies the allegations in paragraph 36.
37. LaRue Tactical admits the allegations in paragraph 37.
38. LaRue Tactical denies the allegations in paragraph 38.
39. LaRue Tactical admits the allegations in paragraph 39.
40. LaRue Tactical denies the allegations in paragraph 40.
41. LaRue Tactical denies the allegations in paragraph 41.
42. LaRue Tactical denies the allegations in paragraph 42.
43. LaRue Tactical admits the allegations contained in paragraph 43.
44. LaRue Tactical lacks knowledge or information sufficient to form a belief as to the truth  
of the allegations contained in paragraph 44 and therefore denies them.
45. LaRue Tactical admits the allegations of paragraph 45.
46. LaRue Tactical admits that it made statements in the Thread concerning this litigation,  
A.R.M.S. and A.R.M.S.' products and that Exhibit I contains copies of statements by  
LaRue Tactical.
47. LaRue Tactical denies the allegations of paragraph 47.

48. LaRue Tactical denies the allegations of paragraph 48.
49. LaRue Tactical denies the allegations of paragraph 49.
50. LaRue Tactical denies the allegations of paragraph 50.
51. LaRue Tactical denies the allegations of paragraph 51.
52. LaRue Tactical denies the allegations of paragraph 52.
53. LaRue Tactical denies the allegations of paragraph 53.
54. LaRue Tactical denies the allegations of paragraph 54.
55. LaRue Tactical reasserts the denials and admissions contained in paragraphs 1-54.
56. LaRue Tactical denies the allegations of paragraph 56.
57. LaRue Tactical denies the allegations of paragraph 57.
58. LaRue Tactical denies the allegations of paragraph 58.
59. LaRue Tactical denies the allegations of paragraph 59.
60. LaRue Tactical reasserts the denials and admissions contained in paragraphs 1-59.
61. LaRue Tactical denies the allegations of paragraph 61.
62. LaRue Tactical denies the allegations of paragraph 62.
63. LaRue Tactical denies the allegations of paragraph 63.
64. LaRue Tactical denies the allegations of paragraph 64.
65. LaRue Tactical denies the allegations of paragraph 65.
66. LaRue Tactical denies the allegations of paragraph 66.
67. LaRue Tactical reasserts the denials and admissions contained in the paragraphs 1  
through 66.
68. LaRue Tactical denies the allegations of paragraph 68.
69. LaRue Tactical denies the allegations of paragraph 69.

70. LaRue Tactical denies the allegations of paragraph 70.

71. LaRue Tactical denies the allegations of paragraph 71.

72. LaRue Tactical denies the allegations of paragraph 72.

73. LaRue Tactical reasserts the denials and admissions contained in the paragraphs 1 through 72.

74. LaRue Tactical denies the allegations of paragraph 74.

75. LaRue Tactical denies the allegations of paragraph 75.

76. LaRue Tactical denies the allegations of paragraph 76.

77. LaRue Tactical denies the allegations of paragraph 77.

78. LaRue Tactical denies the allegations of paragraph 78.

79. LaRue Tactical reasserts the denials and admissions contained in the paragraphs 1 through 78.

80. LaRue Tactical denies the allegations of paragraph 80.

81. LaRue Tactical denies the allegations of paragraph 81.

82. LaRue Tactical denies the allegations of paragraph 82.

83. LaRue Tactical denies the allegations of paragraph 83.

84. LaRue Tactical denies the allegations of paragraph 84.

85. LaRue Tactical denies the allegations of paragraph 85.

86. LaRue Tactical denies the allegations of paragraph 86.

87. LaRue Tactical denies the allegations of paragraph 87.

88. LaRue Tactical denies the allegations of paragraph 88.

89. LaRue Tactical reasserts the denials and admissions contained in the paragraphs 1 through 88.

90. LaRue Tactical denies the allegations of paragraph 90.
91. LaRue Tactical denies the allegations of paragraph 91.
92. LaRue Tactical denies the allegations of paragraph 92.
93. LaRue Tactical denies the allegations of paragraph 93.
94. LaRue Tactical denies the allegations of paragraph 94.
95. LaRue Tactical denies the allegations of paragraph 95.
96. LaRue Tactical denies the allegations of paragraph 96.
97. LaRue Tactical denies the allegations of paragraph 97.
98. LaRue Tactical denies the allegations of paragraph 98.
99. LaRue Tactical reasserts the denials and admissions contained in the paragraphs 1 through 98.
100. LaRue Tactical denies the allegations of paragraph 100.
101. LaRue Tactical denies the allegations of paragraph 101.
102. LaRue Tactical denies the allegations of paragraph 102.
103. LaRue Tactical denies the allegations of paragraph 103.
104. LaRue Tactical denies the allegations of paragraph 104.
105. LaRue Tactical reasserts the denials and admissions contained in the paragraphs 1 through 104.
106. LaRue Tactical denies the allegations of paragraph 106.
107. LaRue Tactical denies the allegations of paragraph 107.
108. LaRue Tactical denies the allegations of paragraph 108.
109. LaRue Tactical reasserts the denials and admissions contained in the paragraphs 1 through 108.

110. LaRue Tactical admits the allegations of paragraph 110.

111. LaRue Tactical denies the allegations of paragraph 111.

112. LaRue Tactical denies the allegations of paragraph 112.

113. LaRue Tactical denies the allegations of paragraph 113.

114. LaRue Tactical denies the allegations of paragraph 114.

115. LaRue Tactical denies the allegations of paragraph 115.

116. LaRue Tactical denies the allegations of paragraph 116.

117. LaRue Tactical denies the allegations of paragraph 117.

118. LaRue Tactical denies the allegations of paragraph 118.

#### **AFFIRMATIVE DEFENSES**

Further answering, LaRue Tactical alleges as follows:

119. LaRue Tactical did not, and does not, directly infringe, indirectly infringe, contribute to or induce infringement of any valid or invalid or enforceable claim of U.S. Patent No. 4,845,871 (the '871 patent) and has not otherwise committed any act in violation of the patent laws of the United States, Title 35 U.S.C. §§100, *et seq.*, and more particularly, has not committed any act in violation of 35 U.S.C. § 271.

120. The '871 patent is invalid because it fails to comply with one or more of the statutory requirements of patentability specified in Title 35 U.S.C. §101 *et seq.*, including without limitation 35 U.S.C. §§ 102, 103, and 112.

121. A.R.M.S.' alleged remedies are limited due to failures to comply with 35 U.S.C. § 287.

122. The relief sought by A.R.M.S. is barred in whole or in part by the doctrine of laches.

123. The relief sought by A.R.M.S. is barred in whole or in part by the doctrine of unclean hands and/or patent misuse.

124. By reason of the prosecution before the United States Patent and Trademark Office (“Patent Office”) leading to the ‘871 patent, and by reason of admissions made by or on behalf of the applicant for this patent, A.R.M.S. is estopped from claiming infringement by LaRue Tactical of one or more claims of the ‘871 patent.
125. A.R.M.S. is equitably estopped from pursuing claims under the ‘871 patent.
126. LaRue Tactical did not, and does not, directly infringe, indirectly infringe, contribute to or induce infringement of U.S. Trademark Registration Nos. 3,466,163 and 3,478,909, in violation of Section 43(a) of the Lanham Act, 15 U.S.C. §1125(a).
127. U.S. Trademark Registration Nos. 3,466,163 and 3,478,909 are invalid because the designs registered thereunder are functional, thus failing to comply with one or more of the statutory requirements under the Trademark Act of 1946, 15 U.S.C. §§1051 *et seq.* (the Lanham Act).
128. LaRue Tactical did not, and does not, conduct acts that constitute federal unfair competition, false designation of origin, false and misleading descriptions and representations, or false advertising in violation of Section 43(a) of the Lanham Act, 15 U.S.C. §1125(a).
129. LaRue Tactical did not, and does not, infringe U.S. Trademark Registration No. 3,385,512, U.S. Trademark Registration No. 3,466,163 or U.S. Trademark Registration No. 3,478,909, in violation of Section 32(1) of the Lanham Act, 15 U.S.C. § 1114.
130. U.S. Trademark Registration No. 3,385,512 is invalid because the mark registered thereunder does not function as a trademark and fails to comply with one or more of the statutory requirements for registration under the Trademark Act of 1946, 15 U.S.C. § 1051 *et seq.* (the Lanham Act).

131. The Second Amended Complaint fails to state a claim upon which relief may be granted.
132. Plaintiff's claims are or may be barred, in whole or in part, because the alleged damages were caused by someone for whose conduct the Defendant is not responsible.
133. Plaintiff's claims are or may be barred because the acts and omissions, if any, of the Defendant were not the proximate cause of the damages alleged.
134. Plaintiff's claims are or may be barred because the Plaintiff's damages, if any, were proximately caused by independent, intervening and superseding causes.
135. Plaintiff was negligent and that negligence proximately contributed to the damages alleged. Any recovery by Plaintiff should be reduced proportionately or barred.
136. Plaintiff is estopped by its conduct from recovery.
137. Plaintiff's claims are or may be barred, in whole or in part, by the doctrines of waiver, estoppel and laches.
138. Plaintiff has failed to mitigate or avoid damages, if any, and to that extent, may not recover from the Defendant.
139. Plaintiff's claims are barred by the doctrine of unclean hands.
140. Plaintiff's claims are barred because the allegedly defamatory or disparaging statements are statements of opinion.
141. Plaintiff's claims are barred because the allegedly defamatory or disparaging statements are statements of opinion which Defendant believed, as a matter of opinion, to be true.
142. The Plaintiff is libel proof.
143. The Defendant has a conditional or absolute privilege.

144. Plaintiff's claims are barred because the allegedly defamatory or disparaging statements are true and, therefore, are justified under M.G.L. c. 231, § 92.
145. Plaintiff's claims are barred because the allegedly defamatory or disparaging statements are true.
146. Plaintiff's claims are barred because the allegedly defamatory or disparaging statements are rhetorical hyperbole, puffery, or negative puffery.
147. Some or all of the Plaintiff's claims are barred by the First Amendment and constitutional protections afforded to free speech under the Constitution and Declaration of Rights of the Commonwealth of Massachusetts and/or the United States Constitution and Bill of Rights.
148. Plaintiff's claims are barred because the Plaintiff has suffered no harm to its reputation, business or otherwise, as a result of the alleged defamatory or disparaging statements, or as the result of any other conduct.
149. The Defendant is a public figure and/or the matters at issue are matters of public concern and/or the public interest is a predominant factor.
150. Plaintiff's claims are barred because the Defendant's alleged interference with contractual and/or prospective advantageous business relations was not improper in motive or means.
151. The transactions and/or actions complained of in the Second Amended Complaint did not occur primarily and substantially within the Commonwealth of Massachusetts.
152. The actions complained of by the Plaintiff were not taken in the course of trade or commerce.



**DEFENDANT' S PRAYER FOR RELIEF WITH RESPECT  
TO DEFENSES AND AFFIRMATIVE DEFENSES**

153. **WHEREFORE**, LaRue prays for judgment in its favor and against A.R.M.S. and requests that this Court:

- A. dismiss Plaintiff's Complaint with prejudice;
- B. enter Judgment in favor of LaRue and against A.R.M.S. on each Count of Plaintiff's Second Amended Complaint;
- C. award no damages, relief, attorneys' fees, costs or expenses to A.R.M.S.;
- D. deny the relief requested by A.R.M.S. in paragraphs A-T of Defendant's Prayer for Relief;
- E. award Defendant its reasonable costs, expenses and attorneys' fees; and
- F. for such other and further relief as this Court deems proper and just.

**JURY DEMAND**

154. LaRue Tactical requests a trial by jury to the fullest extent permitted by law.

**COUNTERCLAIMS OF LARUE TACTICAL**

Defendant and Counterclaim Plaintiff LaRue Tactical plead the following counterclaims against Plaintiff and Counterclaim-Defendant A.R.M.S.

155. Austin Precision Products, Inc. d/b/a LaRue Tactical is a corporation organized and existing under the laws of Texas, having a principal place of business at 850 County Road 177, Leander, Texas 78641.

156. A.R.M.S. alleges that it is a corporation organized and existing under the laws of the Commonwealth of Massachusetts, having its principal place of business at 230 West Center Street, West Bridgewater, Massachusetts.

## **JURISDICTION AND VENUE**

157. This court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§1331 and 1338(a) because the action concerns a federal question relating to patents arising under Title 35 of the United States Code and pursuant to 28 U.S.C. §§ 2201 and 2202 because this is a civil action for declaratory judgment.

158. This court has personal jurisdiction over A.R.M.S. by virtue of its having submitted to the jurisdiction of this Court by filing the underlying lawsuit.

159. Venue is proper under 28 U.S.C. §§ 1391 and 1400.

## **CLAIMS FOR RELIEF**

### **DECLARATORY JUDGMENT COUNTERCLAIMS**

160. LaRue Tactical incorporates by reference the allegations of paragraphs 1 - 164 above, as though fully set forth herein.

161. LaRue Tactical did not and does not directly infringe, indirectly infringe, contribute to or induce infringement of any valid or enforceable claim of the '871 patent.

162. The '871 patent is invalid for failing to meet the conditions of patentability set forth at 35 U.S.C. § 101 *et seq.*, including without limitation, 35 U.S.C. §102, 103 and/or 112.

163. An actual controversy exists between LaRue Tactical and A.R.M.S. concerning the alleged infringement, the validity of the '871 patent by virtue of A.R.M.S.' allegation of infringement.

164. LaRue Tactical is entitled to judgment from this Court that the '871 patent is not infringed by LaRue Tactical, and is invalid.

165. This is an exceptional case entitling LaRue Tactical to an award of its attorneys' fees incurred in connection with this action pursuant to 35 U.S.C. §285.

166. U.S. Trademark Registration No. 3,385,512 is invalid and the alleged mark identified therein fails to function as a mark in violation of Sections 1, 2, and 45 of the Lanham Act, 15 U.S.C. §§ 1051, 1052, and 1127, such that the registration should be cancelled.
167. The alleged mark identified in U.S. Trademark Registration No. 3,385,512 is not inherently distinctive and has not acquired distinctiveness in violation of Sections 1, 2, and 45 of the Lanham Act, 15 U.S.C. §§ 1051, 1052, and 1127, such that the Registration should be cancelled.
168. U.S. Trademark Registration Nos. 3,466,163 and 3,478,909 are invalid because the alleged trade dress identified therein is functional in violation of Sections 1, 2, and 45 of the Lanham Act, 15 U.S.C. §§ 1051, 1052, and 1127, such that the Registrations should be cancelled.
169. The alleged trade dress identified in U.S. Trademark Registration Nos. 3,466,163 and 3,478,909 is not inherently distinctive and has not acquired distinctiveness in violation of Sections 1, 2, and 45 of the Lanham Act, 15 U.S.C. §§ 1051, 1052, and 1127, such that the Registrations should be cancelled.
170. U.S. Trademark Registration Nos. 3,466,163 and 3,478,909 are invalid because the '871 patent discloses the utilitarian advantages of the designs sought to be registered under the marks in violation of Sections 1, 2, and 45 of the Lanham Act, 15 U.S.C. §§ 1051, 1052, and 1127, such that the Registrations should be cancelled.

#### **PRAYER**

**WHEREFORE**, PREMISES CONSIDERED, LaRue Tactical prays that for an Order and Judgment from this Honorable Court:

- A. declaring that LaRue Tactical does not infringe any claim of the '871 patent;

- B. declaring that each and every claim of the '871 patent is invalid;
- C. declaring that LaRue Tactical does not infringe the #17<sup>®</sup> trademark and cancelling Registration No. 3,385,512;
- D. declaring that A.R.M.S. trade dress is invalid due to its functionality and cancelling Registration Nos. 3,466,163 and 3,478,909;
- E. declaring that LaRue Tactical has not committed any acts that constitute trade dress infringement in violation of Section 43(a) of the Lanham Act, 15 U.S.C. §1125(a);
- F. declaring that LaRue Tactical has not committed any acts that constitute unfair competition, false designation of origin, and false advertising in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a);
- G. declaring that LaRue Tactical has not committed any acts that constitute unfair competition in violation of common law;
- H. declaring that LaRue Tactical has not committed any acts that constitute defamation;
- I. declaring that LaRue Tactical has not committed any acts that constitute unfair competition in violation of M.G.L. ch. 93A;
- J. declaring that A.R.M.S. is not entitled to any monetary damages, royalties or profits;
- K. adjudging that A.R.M.S. is not entitled to any injunctive relief sought by A.R.M.S.;
- L. adjudging that this case is "exceptional" within the meaning of 35 U.S.C. § 285, entitling LaRue Tactical to an award of its reasonable attorneys' fees, expenses and costs; and
- M. granting such other and further equitable or legal relief as the Court deems just and proper.

### **JURY DEMAND**

171. LaRue Tactical requests a trial by jury to the fullest extent permitted by law.

DATED: March 31, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of March 2010, a true copy of the foregoing was filed through the ECF system and will be sent electronically to the registered participants as identified in the Notice of Electronic Filing:

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UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

ATLANTIC RESEARCH  
MARKETING SYSTEMS, INC.,  
Plaintiff,

v.

CIVIL ACTION NO.  
09-10034-DPW

AUSTIN PRECISION PRODUCTS,  
INC. d/b/a LARUE TACTICAL,  
Defendant.

**AMENDED SCHEDULING ORDER**

WOODLOCK, J.

This Order is intended primarily to aid and assist counsel in scheduling and planning the preparation and presentation of cases, thereby insuring the effective, speedy and fair disposition of cases, either by settlement or trial.

In accordance with this Court's ruling made in open court at the hearing held on 3/10/10, granting the plaintiff's Motion for Extension of Time to Complete Discovery, it is hereby ORDERED pursuant to Rule 16(b) of the Federal Rules of Civil Procedure and Local Rule 16.1(F), that:

- (1) fact discovery is to be completed by **JUNE 18, 2010**, unless shortened or enlarged by Order of this Court;
- (2) all trial experts are to be designated and disclosure of information contemplated by Fed. R. Civ. P. Rule 26 provided by the plaintiff(s) and by the defendant(s) no later than **JULY 19, 2010**; all rebuttal experts are to be designated and disclosure of information contemplated by Fed. R. Civ. P. Rule 26 provided by the plaintiff(s) and by the defendant(s) no later than **AUGUST 18, 2010**; Expert depositions shall be completed by **SEPTEMBER 17, 2010**;

- (3) dispositive motions are to be filed by **OCTOBER 25, 2010**, after completion of the necessary discovery and responses are to be filed within fourteen (14) calendar days thereafter pursuant to Local Rule 7.1 and all filings must conform to the requirements of Local Rule 56.1;

(4) **ELECTRONIC FILING:**

All future submissions in this case are subject to electronic filing and all counsel who choose to appear must make arrangements to register for participation in electronic case filing, if they have not already done so.

All provisions and deadlines contained in this order having been established with the participation of the parties to this case, any requests for modification must be presented to the judge or magistrate judge, if referred for case management proceedings. Any requests for extension will be granted only for good cause shown supported by affidavits, other evidentiary materials, or reference to pertinent portions of the record. The request shall be made by motion and shall contain the reasons for the request, a summary of the discovery which remains to be taken, and a date certain when the requesting party will complete the additional discovery, join other parties, amend the pleadings or file motions. The Court may then enter an amended scheduling order, if necessary.

Counsel are encouraged to seek an early resolution of this matter. Additional case management conferences may be scheduled by the court or upon the request of counsel, if the Court can be of assistance in resolving preliminary issues or in settlement.

By the Court,

/s/ Jarrett Lovett  
Deputy Clerk

DATE: 3/11/10